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QUARTERLY REPORT

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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.state.in.us.

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CHEERLEADING SAFETY: CHANTS OF LIFETIME

During the 2005 session of the Indiana General Assembly, the legislature passed P.L. 65-2005, which is intended to safeguard the safety of students participating in cheerleading activities. The new statute reads in pertinent part:

I.C. § 20-19-2-8 Adoption of Administrative Rules by State Board

Sec. 8. (a) In addition to any other powers and duties prescribed by law, the state board shall adopt rules under I.C. § 4-22-2 concerning, but not limited to, the following matters: . . .

(10) The establishment and enforcement of standards and guidelines concerning the safety of students participating in cheerleading activities.

In September of 2005, the Indiana State Board of Education asked the Indiana Department of Education (DOE) to establish an advisory committee to assist the State Board in developing a proposed rule as contemplated by the legislation. The State Board specifically asked the advisory committee to do the following:

1. Review the Spirit Rules of the National Federation of State High School Associations (NFHS);
2. Recommend additions or deletions to the NFHS for use in Indiana; and
3. Recommend training requirements for coaches or sponsors.

The NFHS's Spirit Rules have been adopted and adapted by states that have addressed cheerleading. Currently, the Indiana Association of School Principals (IASP) has a Cheer Advisory Board that has recommended certain adaptations of the NFHS's rules for use in Indiana. IASP also sanctions cheerleading competitions, conducts rule-interpretation meetings, and holds an annual Cheer Coaches Conference.

The Advisory Committee established through the DOE has fifteen (15) members, representing a cross section of Indiana schools, including cheer coaches at all levels, both urban and rural, including a lay coach and a nonpublic school coach; a parent; an athletic director; a school nurse; teachers, both in general and special education; school administrators; a business manager; and a business owner. All members have had some experience with cheer activities, either in the recent past or currently. The NFHS has been providing additional information for consideration by the Advisory Committee.

Any observer of cheer activities would notice that routines, even in the elementary schools, are becoming increasingly complex, which increases the potential for serious injuries or death. The NFHS recently provided to the Advisory Committee a report authored by Frederick O. Mueller, Ph.D., the Director of the National Center for Catastrophic Sport Injury Research, which is located at the University of North Carolina in Chapel Hill. According to Dr. Mueller's report, the Consumer Product Safety Commission reported an estimated 4,954 hospital emergency room

visits in 1980 attributable to cheerleading injuries.¹ By 1986, this number had grown to 6,911. By 1994, the number was approximately 16,000. In 1999, the number was 21,906. Dr. Mueller's report did broach the question, albeit rhetorically, whether cheerleading is considered an activity ancillary to sports or is it a sport itself. As a sport, it would be the ninth most popular high school girls' sport with nearly 90,000 females indicating active participation during a survey during the 2003-2004 school year. Dr. Mueller listed eleven "sample guidelines that may help prevent cheerleading injuries":

1. Cheerleaders should have medical examinations before they are allowed to participate, including a complete medical history.
2. Cheerleaders should be trained by a qualified coach with training in gymnastics and partner stunting. This person should also be trained in the proper methods for spotting and other safety factors.
3. Cheerleaders should be exposed to proper conditioning programs and trained in proper spotting techniques.
4. Cheerleaders should receive proper training before attempting gymnastic and partner-type stunts and should not attempt stunts they are not capable of completing. A qualification system demonstrating mastery of stunts is recommended.
5. Coaches should supervise all practice sessions in a safe facility.
6. Mini-trampolines and flips or falls off of pyramids and shoulders should be prohibited.
7. Pyramids over two high should not be performed. Two high pyramids should not be performed without mats and other safety precautions.
8. If it is not possible to have a physician or athletic trainer at games and practice sessions, emergency procedures must be provided. The emergency procedure should be in writing and available to staff and athletes.
9. There should be continued research concerning safety in cheerleading.
10. When a cheerleader has experienced or shown signs of head trauma (loss of consciousness, visual disturbances, headache, inability to walk correctly, obvious disorientation, memory loss), she/he should receive immediate medical attention and should not be allowed to practice or cheer without permission from the proper medical authorities.
11. Cheerleading coaches should have some type of safety certification.²

The report listed a number of incidents where serious injuries or death occurred. These incidents included falls from a pyramid, striking head on the floor (fractured skull, concussion, partial paralysis, massive brain damage, death, paralysis from waist down); tumbling accident while diving over a mini-trampoline and several cheerleaders (fractured and dislocated cervical vertebrae with paralysis); tumbling routine (paralysis); back-flip off the shoulders of another cheerleader (paralyzed from chest down); front-flip from a mini trampoline (dislocated cervical

¹The injuries involve cheerleading at all levels, including post-secondary.

² See "Special Section on Cheerleading," *National Center for Catastrophic Sports Injury Research 22nd Annual Report: Fall of 1982 - Spring of 2004*, which can be viewed and downloaded at <http://www.unc.edu/depts/nccsi/AllSport.htm>.

vertebrae with quadriplegia); back flips on wet surface (fractured cervical vertebra with quadriplegia, spinal cord shock with temporary paralysis); fall from double-level cheerleading stance, hitting head on the floor (death); basket toss stunts (closed head injury, quadriplegia); and collapsing during routines (heart-related deaths). High school and college cheerleaders account for one-half of the catastrophic injuries to female athletes.

The American Academy of Pediatrics recently published in *Pediatrics*, its official journal, an analysis of cheerleader injuries over a 13-year period.³ In “Cheerleading-Related Injuries to Children 5 to 18 years of Age: United States, 1990-2002,” Brenda J. Shields, M.S., and Dr. Gary A. Smith wrote that participation in cheerleading activity has grown exponentially since it originated on November 2, 1898, when Johnny Campbell led the first cheers at a Minnesota University football game. In 2002, there were an estimated 3.5 million cheerleading participants six years old or older, representing an estimated 18 percent increase in the number of participants from 1990.

There has also been an increased number of injuries that are not attributable solely to the increased numbers of participants. “Cheerleading has evolved into an activity demanding high levels of skill and athleticism,” the researchers noted. Cheerleader skills are more gymnastic than previous cheer styles. In addition, it has become a year-round activity as national competitions and summer training camps have become additional endeavors along with the typical three athletic seasons during a school year.

From 1990-2002, the researchers estimated there were 223,300 cheerleading-related injuries treated in emergency rooms, with 208,800 of these injuries occurring to cheerleaders between the ages of 5 and 18.⁴ There was a 110 percent increase in injuries to cheerleaders between the ages of 5 and 18 from 1990 to 2002, with 97 percent of the injured cheerleaders being female. The majority of the injuries (52.4 percent) were strains or sprains. Other injuries included soft-tissue injuries (18.4 percent), fractures or dislocations (16.4 percent), lacerations or avulsions (3.8 percent), concussions or closed-head injuries (3.5 percent), with 5.5 percent constituting other conditions. There was a correlation between seasons (basketball and football accounted for most incidents) and the age of the cheerleader (the older the cheerleader, the less serious the injury). High school cheerleading accounted for 47 percent of all high school direct catastrophic injuries to female athletes.⁵

³An on-line version of the article is available at <http://www.pediatrics.org/cgi/content/full/117/1/122>.

⁴The estimates do not include those injuries that were attended to by cheerleaders themselves, trainers, or personal physicians. Of the injuries estimated, 98.7 percent of patients with cheerleader injuries were treated and released.

⁵Shields and Smith reported that on March 11, 2002, the University of Nebraska-Lincoln banned cheerleading stunts and tumbling following a catastrophic injury to a cheerleader who fractured her neck doing a handspring during practice. The university settled for \$2.1 million. The university reinstated cheerleader routines, including stunts and tumbling, in 2003.

Most injuries in cheerleading occur during gymnastics maneuvers and partner stunts. Cheerleading maneuvers such as pyramid formations and basket tosses expose cheerleaders to an increased risk of sustaining a fall-related injury. Young children and those who participate in non-contact sports often are not taught how to fall properly to minimize injury[.]

* * *

The major issues involved in the safety of cheerleaders include the experience levels of cheerleaders, coaches, and spotters; the conditioning of the cheerleaders; the types of maneuvers being performed; the type of surfacing on which cheerleaders practice and perform; the appropriate use of properly trained spotters; and the supervision present during practice sessions and performances.

Given the evolution of cheerleading from a school-spirit activity into an activity demanding high levels of gymnastics skill and athleticism, Shields and Smith reached three conclusions:

1. There should be a set of uniform rules and regulations for cheerleaders, and these rules and regulations should be enforced;
2. There should be uniform requirements regarding safety training and certification for cheerleading coaches, with mandatory completion of such training a prerequisite to coaching;⁶ and
3. There should be established a national database for cheerleading-related injuries that would permit better identification and monitoring of risk factors, which would aid in the development of injury-prevention strategies based on epidemiologic evidence.

The State Board contemplates that a proposed rule will be available for public comment in the early months of 2006.

⁶On February 10, 2005, the Minnesota State High School League released a policy statement requiring all cheer coaches directly responsible for supervision of stunting to be certified by the American Association of Cheerleading Coaches and Advisors (AACCA) in safety and stunt progression. All coaches had to be certified by the start of the 2005-2006 school year. Schools or coaches that choose not to become certified could coach from the sideline but the cheer squads would not be permitted to perform any stunting activities. For the statement, see http://www.mshsl.org/mshsl/sports/cheer_stunting.htm.

T-SHIRTS: FREE-SPEECH RIGHTS VS. SUBSTANTIAL DISRUPTION

By Kylee K. Bassett, Legal Intern⁷ and
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[**Editor's Note:** Although by statute, Indiana public schools may establish dress codes,⁸ “dress code” actually implicates two different types of policy: “Uniform Policies,” which prescribe dress and typically do not implicate student free-speech issues under the First Amendment⁹; and “Dress Codes” that proscribe the wearing of certain clothing, which often do implicate student free-speech issues.¹⁰ Whether student speech can be justifiably regulated within the public school context often requires resort to the trilogy of student free-speech cases issued by the U.S. Supreme Court: (1) school-sponsored speech, as addressed by Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988); (2) vulgar, lewd, obscene and plainly offensive speech under Bethel School District v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986); and speech that falls into neither category but causes a material disruption, is reasonably likely to do so, or interferes with other students' rights, as addressed in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969). This article focuses on one element of the dress code: the ubiquitous T-shirt.]

In recent years, there have been a number of cases pitting students wearing T-shirts emblazoned with particular messages against dress code policies of school boards with the crux of the dispute implicating the First Amendment's Free Speech Clause. The most recent case addressing this issue comes out of Indiana, Griggs v. Fort Wayne School Bd., 359 F.Supp.2d 731 (N.D. Ind. 2005).¹¹ In any dispute concerning dress code policies and student free speech and expression

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⁸See I.C. § 20-33-8-12(a)(1)(A) (“The governing body of a school corporation must do the following: (1) Establish written discipline rules, which may include: (A) appropriate dress codes[.]).

⁹The First Amendment is comprised of four clauses: “Congress shall make no law respecting an establishment of religion [the Establishment Clause], or prohibiting the free exercise thereof [the Free Exercise Clause]; or abridging the freedom of speech, or of the press [the Free Speech Clause]; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances [the Assembly Clause].” In the following article, the first three (3) clauses are implicated in some fashion.

¹⁰See “Dress Codes: Free Speech and Standing,” **Quarterly Report** April-June: 2002.

¹¹Baxter v. Vigo County School Corp., 26 F.3d 728 (7th Cir. 1994) is the seminal case in Indiana on this issue. The plaintiffs had complained to the school concerning grades, alleged racism and other unspecified policies at Lost Creek Elementary School. Their daughter, a fourth grade student, began to wear T-shirts that read “Unfair Grades,” “Racism,” and “I Hate Lost Creek.” The principal prohibited the student from wearing these T-shirts, an action plaintiffs asserted violated the student's right to freedom of

rights, courts look to three U.S. Supreme Court decisions for guidance, as addressed by the court in Griggs *infra*.

The student, Griggs, in support of the American troops overseas, wore a T-shirt to his high school that included “My Rifle – The creed of a United States Marine,” along with a picture of an M16 rifle.¹² The Fort Wayne Community Schools’ Student Rights and Responsibilities Code at Rule 3 included a dress code policy. The code stated that:

Inappropriate clothing or other attire that may disrupt the classroom is not allowed. Examples include shirts. . . with slogans, sayings, or messages that are solicitous, profane, obscene, or advertise such things as beer, illegal substances, etc.; . . .and/or apparel depicting derogatory or inflammatory racial, ethnic, religious slogans or symbols, or symbols of violence. Students who are dressed inappropriately will be asked to change or remove the offending article.

Id. at 733 (emphasis original). The administration found Griggs’s T-shirt to be “inappropriate for the educational setting” and refused to allow him to wear it to school. Id. at 732. After being told by an administrator not to wear the shirt, Griggs—in an attempt to prove a point that his shirt was worn to support the Marines—wore the shirt for a second time. He was sent to in-school suspension to wait for his father to pick him up. Ironically, while Griggs was awaiting his father’s arrival, he noticed a Marines’ recruiting poster on the wall of the in-school suspension room, depicting a Marine carrying a rifle “virtually identical to the one on Griggs’s shirt.” Id. at 735. Griggs brought suit against the Fort Wayne School Board and various school officials (“the Board”) claiming that his “First Amendment’s guarantee of freedom of speech gives him the right to wear the shirt.” Id. at 733. Further, he contended that the school’s dress code, specifically, “‘apparel depicting. . . symbols of violence’ is an impermissibly broad restriction on student speech.” Id.

speech by preventing her from speaking out on matters of public concern. The federal district court dismissed the complaint. The 7th Circuit upheld the dismissal, noting that the student is an elementary school student and that her age is a relevant factor when determining the extent to which self-expression is to be abridged. Id. at 738. The 7th Circuit elected to follow Fraser and Hazelwood. The 7th Circuit noted that a student’s age affects the extent to which self-expression may be abridged. Tinker involved older students, and would not be applicable to an elementary school child in this case. Even though students do not shed their constitutional rights at the school house gate, school officials do have to maintain order in the schools. Expression that would “materially and substantially interfere with the requirement of appropriate discipline in the operation of the school” may be prohibited. The extent of First Amendment free-speech rights for elementary school students is not clearly established.

¹²“My Rifle” is a short “creed” that stresses the interdependence of a soldier and his weapon in a theater of action.

The school objected to the depiction of the gun as well as some of the language in the creed.¹³ Further, the school maintained that the T-shirt was inappropriate because of the effects the student body still experienced following the recent tragic murder of a fellow classmate.¹⁴

The two principal issues were “whether the *First Amendment* allows the Board to (1) generally proscribe clothing ‘depicting. . . symbols of violence’; and (2) forbid Griggs from wearing his Marine Creed shirt in school.” *Id.* at 736. The court acknowledged that the “*First Amendment* protects the individual’s right to freedom of speech and expressive conduct. . . [;h]owever, the freedom of speech is not absolute, as it must sometimes give way to ‘subordinating valid governmental interests.’” *Id.* (internal citation omitted). In reaffirming the need for balance of the competing interests in the public school context, the court cited to Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969):

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with the fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of *First Amendment* rights collide with the rules of the school authorities.

Griggs, 359 F.Supp. 2d at 737, quoting Tinker, 393 U.S. at 506-07. But Tinker is only the starting point for analysis. This court evaluated the “trilogy of school-speech cases” in order to balance these competing interests. *Id.* Griggs and the Board had their own interpretations of the three U.S. Supreme Court cases, as well as what standard should be applied for this case.

The seminal case, Tinker,¹⁵ involved a group of students who wore armbands in protest of the Vietnam War. The court there held that “the school could not ban the armbands, as there was ‘no evidence whatsoever of. . . interference, actual or nascent, with the schools’ work or of collision of the rights of other students to be secure and to be let alone.’” *Id.* at 737 (*quoting Tinker*, 393 U.S. at 508-09). Tinker has been recognized to “stand for the proposition that a

¹³ “I must shoot straighter than my enemy who is trying to kill me. I must shoot him before he shoots me.” *Id.* at 734.

¹⁴The details of the murder are tragic. In August 2002, a senior classmate was kidnaped, tortured, and brutally murdered with her body then set on fire. This horrific event received widespread publicity in the Fort Wayne area. The individuals who committed this act were the student’s acquaintances with at least two being former students of the high school. Relatives of both the victim and the murderers still attended the high school. *Id.* at 735

¹⁵See “Uniform Policies and Constitutional Challenges,” **Quarterly Report**, October-December 2000.

student's 'pure speech' in school cannot be banned absent a reasonable forecast of 'substantial disruption.'" Id. at 738.

The second of the trilogy is Bethel School Dist. v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986),¹⁶ which involved a student who at a school assembly made a speech nominating another student for an elected office but referred to the student in an "elaborate, graphic, and explicit sexual metaphor." Griggs, 359 F.Supp.2d at 738, quoting Fraser, 478 U.S. at 677-79. The Court of Appeals found for the student after applying the Tinker test.¹⁷ However, the Supreme Court reversed the lower court's decision and contrasted the "'nondisruptive, passive expression of a political view-point in Tinker' from the 'offensively lewd and indecent speech' of the [student in Fraser]." Id., quoting Fraser, 478 U.S. at 680, 685. The Supreme Court found:

[T]he school's interest in "teaching students the boundaries of socially appropriate behavior" gave it the right to determine "what *manner* of speech in the classroom or in school assembly is inappropriate." Thus, "it was perfectly appropriate for the school to. . .make the point to the pupils that vulgar speech and lewd conduct are wholly inconsistent with the fundamental values of public school education."

Id. at 738, quoting Fraser, 478 U.S. at 685-86 (emphasis original, internal citation omitted).

The third case in the student Free-Speech Trilogy is Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988),¹⁸ which arose when the school refused to publish in the school newspaper students' articles regarding the effects of teenage pregnancy and divorce on the student population. Reversing the Court of Appeals' holding that the school newspaper was considered a "public forum" and finding, after applying the Tinker test, in favor of the students, the Supreme Court concluded that the newspaper was not considered a "public forum," and determined that it was "a supervised learning experience for journalism students." Griggs, 359 F.Supp.2d at 738, quoting Hazelwood, 484 U.S. at 256-66. Distinguishing this case from Tinker, the court pointed out that Tinker "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. . . [whereas here the question] concerns educators' authority over school-sponsored publications. . . [where] students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . ." Id. at 739, quoting Hazelwood, 484 U.S. at 270-71. The Court concluded that schools have greater control over speech within this context and developed a different test for "school-sponsored speech" finding that "educators do not offend the *First Amendment* by exercising editorial control over the style and content of student speech *in school-sponsored expressive*

¹⁶Id.

¹⁷"Reasonable forecast of substantial disruption"

¹⁸See "Uniform Policies and Constitutional Challenges," **Quarterly Report**, October-December 2000.

activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.” *Id.*, quoting Hazelwood, 484 U.S. at 271, 273 (emphasis original).

The Griggs court and eight other Courts of Appeal¹⁹ would likely agree that the school’s ban on Griggs’s T-shirt would fall under the Tinker test, finding Griggs’s T-shirt “is speech that ‘happened to occur on the school premises,’ and thus it could not be banned unless the Board meets Tinker’s ‘substantial disruption’ test.” *Id.* However, the 7th Circuit has precedent that puts a greater emphasis on the Hazelwood standard (“legitimate pedagogical concerns”). In Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996), the majority opined that “absent a public forum, the Hazelwood test (‘reasonably related to legitimate pedagogical concern’) applies to *all* student speech.” Griggs, 359 F.Supp.2d at 740, quoting Muller 98 F.3d at 1537-38. Furthermore, the court held that “all student speech in a nonpublic forum is governed by the Hazelwood test, regardless of whether the speech was (or could be seen as) school-sponsored.” *Id.*, quoting Muller, 98 F.3d at 1537, 1539. Since Muller prevails in the 7th Circuit, Griggs’s argument for the court to use the Tinker standard failed and the Hazelwood standard was employed.

In applying Hazelwood, the court addressed Griggs’s first claim that the dress-code clause “apparel depicting. . . symbols of violence” within Rule 3 of the Code was “too broad²⁰ to pass constitutional muster and thus must be struck down.” *Id.* at 741. Because of the 7th Circuit precedent, the court was bound to apply the Muller/Hazelwood standard. The court had to decide whether Rule 3 is “reasonably related to legitimate pedagogical concern.” *Id.* The court made it clear that schools have a “legitimate pedagogical concern” in preventing violence within the school environment. As Rule 3 is concerned, the court acknowledged that the rule primarily regulated *dress* rather than *speech*. Subsequently, the First Amendment would not be implicated.²¹ However, the court maintained that there are messages that contain symbols of violence that would fall under the First Amendment, as evident in the present situation. The court acknowledged that Rule 3 is vast and would likely prohibit speech that the First Amendment might allow, especially as under the Muller/Hazelwood standard the school can ban “for any reason related to a legitimate pedagogical concern.” *Id.* at 742 (internal citation

¹⁹The 3rd, 4th, 5th, 6th, 8th, 9th, 10th, and 11th Circuits have all adopted similar interpretations. *Id.* at 740.

²⁰The overbreadth doctrine is an “‘expansive remedy’ created ‘out of concern that the threat of enforcement of an overbroad law may deter or chill’ constitutionally protected speech.” *Id.* at 741, quoting Virginia v. Hicks 539 U.S. 113 (2003). A court may “invalidate all enforcement of a law, upon a showing that the law ‘punishes a substantial amount of protected free speech, judged in relation to the law’s plainly legitimate sweep.’” *Id.* However, the United States Supreme Court has cautioned that this doctrine should be used “with hesitation” and “as last resort.” *Id.* Furthermore, because of the responsibilities and duties of a school within a public context, a “more hesitant application” of the overbreadth doctrine is appropriate. *Id.*

²¹The court used as an example if Griggs’s T-shirt depicted only an M16 without the accompanying text, the T-shirt would probably not constitute “speech.” *Id.* at 742.

omitted). As a consequence, Rule 3 is constitutional as the school has a “‘legitimate pedagogical concern’ of preventing school violence.” *Id.* at 743.

But this was a general finding: The court had to determine the constitutionality of the school’s ban specifically as it relates to Griggs’s T-shirt. By applying the *Muller/Hazelwood* test, the court found that the school was not a “public forum” in that it found no evidence that the school was open for “indiscriminate use.”²² Since the school is not considered a “public forum,” *Muller* requires the court “to uphold the Board’s ban on the speech as long as it is ‘reasonably related to legitimate pedagogical concern.’” *Id.* at 743. The board failed to meet its burden in this regard. The court recognized that the board was taking Griggs’s T-shirt out of context in determining that it was inappropriate. The board’s mischaracterization of his T-shirt as one that overly emphasized a message to “kill *one’s* enemy” ultimately undermined the board’s argument. *Id.* The court determined that the T-shirt was clear in its message that a “United States Marine’s pledge to shoot *his* enemies” clearly refers to enemies of the United States. *Id.* (emphasis original). The court acknowledged how a large depiction of an M16 rifle on a student’s shirt would cause concern to any administrator or even cause a negative reaction depending upon one’s viewpoint on guns; however, the court maintained that “it only takes a few seconds of study to realize that the gun is placed in the context of a relatively benign message of support for the military.” *Id.* at 744. Therefore, “it is not the threat of violence by Griggs or a general celebration of killing ‘one’s’ enemies, as the Board claims[,]” but, an expression that refers to violence limited to a military context. *Id.* Subsequently, the board’s reasoning was unpersuasive and the court determined that “no reasonable observer would think that [the T-shirt] related to Columbine or other school shootings in any way.” *Id.* Moreover, the board’s argument regarding tension among students created by the recent student homicide again failed “to demonstrate how banning Griggs’s shirt has any reasonable relation to that interest.” *Id.* Specifically, the court stated that [schools] “cannot merely incant ‘Columbine’ or [a murdered student] like a magic spell allowing it to ban speech totally unrelated to those tragic incidents.” *Id.* at 745.²³ Ultimately, the court found that Rule 3 did not violate the First Amendment, but as applied to the banning of Griggs’s T-shirt, it was unconstitutional.

²²As stated in *Hazelwood*, school facilities are public forums only if “school authorities have by policy or by practice opened these facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.” *Id.* at 743, quoting *Hazelwood*, 484 U.S. at 267.

²³The court went one step further and additionally found that the board’s ban of the T-shirt would also not meet the *Tinker* test. Under the *Tinker* standard, the board would have to present “facts which might reasonably have led it to forecast substantial disruption of or material interference with school activities.” *Id.* at 746, quoting *Tinker*, 393 U.S. at 514. However, the board presented no evidence that could have “reasonably forecast[ed] a disturbance.” *Id.*

Weapons

Griggs was not the first case to involve a T-shirt where a weapon was displayed. Newsom, et al. v. Albemarle County School Board, et al., 354 F.3d 249 (4th Cir. 2003) involves a Virginia middle school student who apparently attended a summer camp sponsored or supported by the National Rifle Association (NRA). During the 2001-2002 school year, the student/parent handbook prohibited students from wearing, *inter alia*, “messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group.” There was no specific reference to “weapons.” Newsom was observed by a school administrator wearing a purple T-shirt that had on its back the silhouettes of three men holding firearms superimposed on the letters “NRA” positioned above the phrase “SHOOTING SPORTS CAMP.” The front of the shirt contained a smaller version of the three silhouetted men superimposed on “NRA.” The school administrator became concerned the T-shirt posed the potential to disrupt the instructional process through the promotion of the use of guns. The administrator was mindful of the tragedy at Columbine High School. The administrator also believed the T-shirt was at odds with the school’s message that “Guns and Schools Don’t Mix.” She asked Newsom to either change the T-shirt or turn it inside out. Although he eventually complied, he resisted initially. The administrator asserted the student would be sanctioned if he did not comply.

That summer, the school amended its policy to prohibit students from wearing, *inter alia*, “messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group.” (Emphasis added.). After the 2002-2003 school year began, Newsom filed suit against the school district, alleging the school’s policy infringed upon his Free Speech rights under the First Amendment. He sought a preliminary injunction. Chief among his complaints was that the school policy “was unconstitutionally overbroad and vague.” He also asserted violation of his First Amendment rights when he was instructed to remove his T-shirt or turn it inside-out the previous school year when the school policy did not reference “weapons.” The federal district court acknowledged the wearing of the T-shirt constituted symbolic speech, but denied the injunctive relief principally because the judge did not believe Newsom had a likelihood of success on the merits of any of his claims. The student appealed to the 4th Circuit.

The 4th Circuit noted the considerations for the granting of a preliminary injunction:

- The likelihood of irreparable harm to Newsom if the injunction is denied;
- The likelihood of harm to the school district if the requested relief is granted;
- The likelihood that Newsom will prevail on the merits of his case; and
- The overarching public interest implicated.

The court focused on Newsom’s contention the school policy was unconstitutionally overbroad, reaching “too much expression that is protected by the First Amendment.” The panel addressed Tinker as the touchstone for analysis based on the limited record before it, noting that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” Tinker, 393 U.S. at 508. However, freedom of expression is not

without prudential limitations in a public school context. “[C]onduct by the student, in class or out of it, which, for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” 393 U.S. at 513. There must be a specific and significant fear of disruption rather than a generalized apprehension. “[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.” Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3rd Cir. 2001).

Fraser (which involved the censoring of student speech that was considered lewd, vulgar, indecent, or plainly offensive, even if not disruptive) was not applicable because Newsom’s T-shirt did not contain such a message. Hazelwood (which involved the censoring of two articles in the school newspaper) was likewise inapplicable. No reasonable observer would perceive Newsom’s T-shirt message as being a school-sponsored message. Newsom did not propose that all weapons-related messages are protected free speech. He acknowledged that the school—even without a written policy—could “prohibit the display of violent, threatening, lewd, vulgar, indecent, or plainly offensive images and messages related to weapons under *Tinker* or *Fraser*.”

For Newsom to succeed in the application of the overbreadth doctrine, he would have to show that the school policy is overly broad in a real and substantial sense compared to its legitimate authority and that the policy is not subject to revision in any sense that would remove a genuine threat or deterrence to the exercise of constitutionally protected expression. The court, prior to discussing the application of the overbreadth doctrine, did acknowledge that (1) because the policy in question involves the duties and responsibilities of a public school, the court should use “a more hesitant application” than would be employed in other contexts; and (2) even though “speech codes in general are looked at with disfavor under the First Amendment because of their tendency to silence or interfere with protected speech, a public school’s speech/disciplinary policy need not be as detailed as a criminal code.”

The court was persuaded by Newsom’s argument that the policy was overbroad because it applied to nonviolent and non-threatening images and messages related to weapons and because there was a dearth of evidence demonstrating that the display of such images or messages related to weapons—nonviolent, nonthreatening, or otherwise—would or had substantially disrupted school operations or interfered with the rights of others. The dress code reached “lawful, nonviolent, and nonthreatening symbols of not only popular, but important organizations and ideals.” The court noted that under the school’s policy, a student could not wear anything that displayed the State Seal of the Commonwealth of Virginia because the Seal shows a woman with a spear standing with one foot on the chest of a vanquished tyrant.²⁴ This would also affect certain mascots, including the school district’s own high school (image of a patriot armed with a musket). Students could wear T-shirts with the peace sign and the message “No War” but

²⁴The State Seal of Indiana has a pioneer clearing land for agricultural purposes. He is wielding an axe. Presumably, this would be prohibited by the school policy as well.

couldn't wear T-shirts in support of troops depicting soldiers or tanks. Even the school's "quintessential political message the school here is trying to promote—"Guns and School Don't Mix"—would, under a reasonable interpretation, be prohibited on clothing" under the policy.

The remaining factors for entering a preliminary injunction—irreparable harm to Newsom, potential harm to the school district, and the public interest—all weighed in Newsom's favor. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). The school district would not be harmed by an injunction. Lastly, the public interest would be served by enjoining the school policy. The federal district court, the 4th Circuit determined, had abused its discretion. The district court's determination in favor of the school district was vacated and the matter was remanded to the court to enter a preliminary injunction.

Religious Beliefs

Not all T-shirt disputes have involved potentially violent messages. Some have included personal beliefs, including whether one's religious beliefs could be limited in a public school context. In Harper v. Poway Unified School District, 345 F. Supp.2d 1096 (S. D. Ca., 2004), after a school planned "Day of Silence," Harper—a student who had firmly held religious beliefs that homosexuality is immoral—believed the event was to endorse and promote homosexual activity. Harper decided to wear T-shirts (of his own creation) that used a bible verse to communicate a negative message toward homosexual behavior.²⁵

After being reprimanded in class for his violation of the school's dress code, Harper was sent to the office. In order to return to class, Harper was told to replace his T-shirt. The vice principal found that the T-shirt was "clearly in violation of the dress code because it had a homemade message, as opposed to a printed or more permanent message on the garment" and it displayed inflammatory words. Id. at 1099. However, Harper refused and had to discuss the matter with the principal who told Harper that his T-shirt was too aggressive and inflammatory whether homemade or pre-manufactured. Id. Consequently, Harper's punishment was a one-day suspension. He was instructed to leave the school premises. He filed a complaint against the school, alleging violations of the First and Fourteenth Amendments.²⁶ The school filed a motion to dismiss the claims. Id. at 1102.

Before conducting its analysis, the court acknowledged:

²⁵The first T-shirt worn read: "*I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED*" (on the front) and "*HOMOSEXUALITY IS SHAMEFUL, Romans 1:27*" (on the back). The second T-shirt worn stated: "*BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED*" (on the front) and "*HOMOSEXUALITY IS SHAMEFUL, Romans 1:27*" (on the back). Id. at 1099.

²⁶The complaint invoked the Freedom of Speech, Free Exercise of Religion, and the Establishment Clauses of the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

[T]he... fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these fundamental values must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students.

Id. at 1103, quoting *Fraser*, 478 U.S. at 681. Furthermore, the court maintained that “[t]he determination of what manner of speech in the classroom. . . is inappropriate properly rests with the school board, and not with the federal courts.” *Id.*, quoting *Fraser*, 478 U.S. at 683.

In addressing the student’s first cause of action regarding Freedom of Speech, the court was governed by the caveats of the three school-speech related cases discussed *supra*. The court determined that if it found the speech to be “plainly offensive,” then *Fraser* controls; if not, *Tinker* controls. Even though the court maintained that the “speech here is clearly not vulgar, lewd or obscene, a determination of whether the speech is plainly offensive is required under *Fraser*.” *Id.* at 1105. After looking at the dictionary definition of “plainly offensive,”²⁷ the court determined that a dictionary definition “may be a starting point but. . . is not the end of the inquiry.” *Id.* Thus, the court concluded that the nature of the expression was “clearly derogatory”; however, it had to determine whether it was “plainly offensive [meaning that the expression is] unmistakably or obviously offensive.” *Id.* The court found the school’s argument – based on a deputy sheriff’s statement – that the “speech at issue could encourage uprising and violence against homosexuals is insufficient in itself to lead the court to conclude as a matter of law that school officials reasonably believed the speech [would] ‘forecast substantial disruption of or material interference with school activities’ to justify censorship.” *Id.* at 1106 (internal citation omitted). Ultimately, the court found that “in the context of the assertions in the complaint viewed as true for purposes of this motion, there may be no reasonable limitation allowed on plaintiff’s expression.” *Id.* In considering the “outer reaches of the First Amendment’s right to free speech,” the court stated that:

There indeed may be no such limit, but when citizens assert, not casually but with deep conviction that the [expression occurs] at a place and in a manner that [may be] taunting and overwhelmingly offensive [to others] of that place, that assertion, uncomfortable as it may be for judges, deserves to be examined.

²⁷The parties disagreed as to the definition of “plainly offensive” as used in Ninth Circuit precedent, *Chandler v. McMinnville School District*, 978 F.2d 524, 530 (9th Cir. 1992). The Ninth Circuit used a dictionary definition of one word to determine if the language was “plainly offensive.” Although the Ninth Circuit recognized that a “dictionary definition ‘may not be determinative in all cases.’” *Harper*, 345 F.Supp.2d at 1105 (quoting *Chandler*, 978 F.2d at 530).

Id., quoting Smith v. Collin, 439 U.S. 916, 99 S.Ct. 291 (1978) (Justice Blackmun dissenting). The student's First Amendment claim was not dismissed²⁸ The court then began its inquiry into whether it would grant the student's motion for preliminary injunction.

In order for a court to grant injunctive relief, the party seeking such relief must show either: "(1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." Id. at 1119. Because the student's First Amendment claims survived the school's motion to dismiss, the court found this to be sufficient to "demonstrate irreparable harm for purposes of the . . . preliminary injunction." Id. Consequently, the court had to determine whether the student "has demonstrated a likelihood of success on the merits of his claims and whether the balance of hardships tip sharply in his favor." Id. After reviewing the record, the court determined that it is not likely that the student would succeed on the merits of his free-speech claim. Even though the school failed to provide additional evidence as to why the speech at issue is "plainly offensive," the court cited to Tinker in stating it "does not require certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption. . . . Thus, a showing that the suppressed speech might reasonably be forecasted as a material disruption at school negates plaintiff's claims." Id. at 1120 (internal citation omitted). The court found that evidence of prior tensions and altercations between students that resulted in "volatile behavior" during the previous year's "Day of Silence" was sufficient to permit the school to suppress the speech at issue. On a final note with regards to the balance of hardships, the court stated:

[T]here is nothing in the record to suggest plaintiff would not be free to proselytize any religious view or any other viewpoint in a manner that does not violate neutral and valid school policies. On the other hand, requiring the [s]chool to allow plaintiff to express this particular viewpoint could result in disruption of the work of the schools or the violation of the rights of other students.

Id. at 1122. The school had the responsibility to act *in loco parentis*. The school argued successfully that "the safety and well-being of gay and lesbian students, and the ability of school administrators to regulate anti-gay speech, outweighs [sic] plaintiff's competing interest." Id. at 1122. Because the scales did not tip sharply in favor of Harper, the injunctive relief was denied. Id.

Chambers v. Babbitt, 145 F.Supp.2d 1068 (D. Minn. 2001) also involved a dispute over a shirt depicting a student's beliefs regarding homosexuality, but this case resulted in a different

²⁸Because of the scope of this article, only the student's First Amendment Free-Speech claim will be addressed. However, in addition, the court denied the school's motion to dismiss the student's First Amendment's Right to Free Exercise of Religion claim and claim under the Establishment Clause. The court did grant the school's motion to dismiss the student's Fourteenth Amendment Equal Protection and Due Process claims.

outcome from Harper, *supra*. Chamber wore a sweatshirt with the message “Straight Pride” on the front and a symbol of a man and woman holding hands on the back. Id. at 1069. After receiving complaints from students, the principal, Babbitt,²⁹ told Chambers that he could not wear the sweatshirt again because of the offense taken by some students and because of school safety concerns.³⁰ The high school has a dress code that proscribed the wearing of items “with unacceptable writing or graphic depictions which offend anyone or distract from the educational experience” of other students. Examples of “unacceptable writing or graphic depictions” included “socially demeaning or derogatory” language or symbols. Id. at 1069. Chambers filed suit, asking for a preliminary injunction, which the court granted.

. . . [T]he Court’s decision to grant injunctive relief serves to reinstate the *status quo* as of January 16, 2001 [(the day before Chambers was told not to wear his shirt)], which is that a student’s freedom of expression is protected in the school environment to the extent that a school does not otherwise have a reasonable belief that such expression could lead to substantial disruption of the school environment or material interference with school activities. The school is not left without authority to quell otherwise constitutionally protected speech when the *Tinker* threshold is established. However the extent that the environment remains as it was on January 17, 2001 [(the day Chambers was asked to remove his shirt)], and to the extent that the facts before the Court represent that environment, then the Court cannot make a finding that the requisite threshold [of the likelihood of substantial disruption or material interference] was met.

Id. at 1072-73. The court acknowledged the struggles and added pressures that students “who identify themselves as gay, lesbian, bisexual, or transgender” have to go through with their friends, family, and community. Id. at 1073. The court maintained that “it is incumbent upon the school, the parents, the students, and the community. . .to work together so that divergent viewpoints, whether they be political, religious, or social, may be expressed in a civilized and respectful manner.” Id. However, the court maintained that such tolerance “includes the tolerance of such viewpoints as expressed by ‘Straight Pride.’” Id. Thus, “[w]hile the sentiment behind the ‘Straight Pride’ message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own.” Id. Although the court understood the intentions behind Babbitt’s decision, the “constitutional implications and the

²⁹Babbitt referred to several school incidents that aided in his decision to not allow Chambers to wear his shirt. For example: a student—who was a perceived homosexual—had his car vandalized; a fight arose between a student wearing a Confederate Flag bandana and an African-American student; and there had been fourteen (14) physical fights within the school year.

³⁰Chambers wore the sweatshirt stating that “he thought it unfair that there were such events as ‘gay pride parades’ when there were no ‘straight pride parades.’” Id. at 1069. He was wearing the shirt in reaction to what he viewed as the school’s promotion of homosexuality through posters that stressed tolerance of diversity. Id. at 1073.

difficult but rewarding educational opportunity created by such diversity of viewpoint are equally as important and must prevail under the circumstances.” *Id.* The court added that it was the “responsibility of the parents and citizens. . .to raise and nurture its children into decent and caring human beings who treat people with dignity, respect, kindness, and equality.” *Id.* at 1074.

Nixon v. Northern Local School District Board of Education, 383 F.Supp.2d 965 (S.D. Ohio 2005) involved a middle-school student who wore to school a T-shirt that had on the front a scriptural passage, but the following appeared on the back:

Homosexuality is a sin!
Islam is a lie!
Abortion is murder!
Some issues are just black and white!

The student was informed he would have to take off the shirt or turn it inside out because it was deemed offensive. He refused. His father supported his son’s decision. The father came to the school and argued with personnel. When he wouldn’t leave, law enforcement was called. He eventually left. The parents later met with the superintendent, who supported the school’s administration. The parents were informed the student would be suspended if he wore the T-shirt to school again. *Id.* at 967-68. The parents sued the school district, seeking injunctive relief.

The school’s policy does prohibit clothing that is “offensive.” School officials exercise discretion in determining which messages are “offensive” and which are not.³¹ In this case, there was no evidence the student’s T-shirt caused any disruption at school or that the student had any history of disruption or disciplinary problems. He had worn other T-shirts with religious messages without incident. *Id.* at 968.

The court had little difficulty finding that the student’s wearing of the T-shirt constituted expression under the First Amendment. *Id.* at 969. The question is to what extent the student is free to express himself in a public school context under the Tinker-Fraser-Hazelwood trilogy of student free-speech cases. The school claimed the speech was “plainly offensive” (*Fraser* application) and invaded the rights of others (*Tinker* application).

The school acknowledged the student’s wearing of the T-shirt caused no disruption at school, but it had the potential to do so, especially should the message be read by Muslims, homosexuals, or anyone who has had an abortion. The court was not persuaded, noting *Tinker* requires a reasonable anticipation of a disruption of school activities rather than an “undifferentiated fear or apprehension of disturbance.” *Id.* at 973. The school was motivated more by a desire to avoid the discomfort or unpleasantness caused by an unpopular viewpoint. *Id.* at 974. In addition,

³¹One T-shirt the school permitted depicted President George W. Bush with the legend “International Terrorist.” This is apparently the same T-shirt at issue in Barber v. Dearborn Public Schools, *infra*.

there is no showing the student's silent, passive expression of opinion interfered with anyone's rights. Id.

Accordingly, the court granted the injunctive relief, entitling the student to wear his T-shirt to school until or unless the school can demonstrate his conduct is substantially disrupting or interfering with the school's activities or functions, or that such is likely to occur. Id. at 975.

In K.D. v. Fillmore Central School District, et al., 2005 U.S. Dist. LEXIS 33871 (W.D. N.Y. 2005), the federal district court granted a preliminary injunction to K.D., a high school student who wore to school a pro-life T-shirt that had displayed on the front in large, capital letters:

ABORTION IS HOMICIDE

On the back of the shirt, the following phrases appeared:

You will not silence my message.
You will not mock my God.
You will stop killing my generation.
Rock for Life!

The principal instructed K.D. not to wear the T-shirt, turn it inside out, or cover it up. The principal claimed he had received complaints from other students about the T-shirt, although K.D. asserted no complaints had been made to him. He would be sent home if he failed to comply. K.D. was not inclined to follow the principal's instructions, although he later did not wear the T-shirt for fear of disciplinary sanctions. The school's dress code provides for in-school suspension where a student refused to modify attire found to violate the dress code. An out-of-school suspension is for persistent violators of the dress code. K.D. sued the school district and the principal, seeking injunctive relief that would permit him to wear the T-shirt.

The court analyzed the case under the aforementioned trilogy of Supreme Court student free-speech cases. The school district argued that Fraser and Hazelwood had modified Tinker such that the school was no longer required to demonstrate material and substantial interference or disruption to the school in order to prevent K.D. from wearing the T-shirt. The school argued that it may regulate K.D.'s "political speech" so long as it did it in a reasonable manner. The school also argued that it did not object to K.D.'s pro-life or anti-abortion message; rather, it objected to the "aggressive" and "confrontational" tone as evidenced by the use of the word "homicide."

The court rejected the school's Hazelwood argument, noting that the T-shirt did not constitute "school-sponsored speech." The court was likewise unpersuaded by the school's argument that the T-shirt's message would constitute a personal attack on other students who have had an abortion or are contemplating having one. "That a student may have an opposing view does not make K.D.'s T-shirt a personal attack on that student for having an opposing viewpoint." Id. at 16. Despite the school's arguments, the court determined the school was attempting to regulate

the content of K.D.'s T-shirt, which would require a Tinker analysis such that the school would have to demonstrate that K.D.'s "speech" would substantially interfere with the school's educational mission. Id. at 18. K.D.'s pro-life message was considered "political speech" by the court, and was passive in the sense he was "simply wearing a T-shirt." There is no evidence that K.D. was "aggressive" or confrontational with others. There is no showing of a material and substantial interference with K.D.'s classes or with the overall administration of the school. In addition, the school identified no infringement of other students' rights. "Certainly, students do not have the right not to be 'upset' when confronted with a viewpoint with which they disagree." Id. at 20. Accordingly, the preliminary injunction was granted. Id. at 24-25.

Disparaging Messages

Brandt v. Board of Education of the City of Chicago, 326 F. Supp. 2d 916 (E.D. Ill. 2004) involved eighth-grade students in a gifted program and a T-shirt design contest. A class T-shirt design contest—an annual eighth grade event at the school—prompted one student from the gifted program to submit his T-shirt idea. After his design did not win, the student decided to create a T-shirt for the students in the gifted program. The T-shirt depicted

a boy giving a thumbs-up signal with one hand. The other arm ends in a handleless nub, from which a leash extends to a dog labeled the "Beaubien³² Bulldog." The head of the boy occupies roughly half of the space of the entire image. The pupil in one of the boy's eyes is extremely dilated, and the boy's teeth are spaced with at least one tooth-space between each existing tooth. The boy is wearing a shirt that says, "Beaubien Class of 2003," and pants bearing a grid design. Given that Plaintiffs thought only the students in the gifted program would want to wear the shirt, Plaintiffs added the word "Gifties" and the year 2003 on the back of the shirt.³³

Id. at 917-18. Before the T-shirt was printed, the school warned the students in the gifted program that if they wore the T-shirt they would face "serious consequences." Id. at 918. The creator of the T-shirt drafted a petition—which fifty students signed despite a threat of suspension from school—to share with his eighth grade classmates to determine if there were any peer objections to the wearing of the "alternative shirt." Id. In spite of the warnings, two-thirds of the students in the gifted program attended class wearing the T-shirt. The students were found to have violated the Uniform Discipline Code ("failing to abide by school rules and regulations") and were confined to their home room without being able to attend class. Parents of the students complained of the manner in which the school disciplined the students and requested the Chicago Board of Education to intervene. The Board's Department of Law purportedly told

³²"Beaubien" refers to the school name: Jean Baptiste Beaubien Elementary School.

³³ The students maintained that "the attraction of the shirt to the eighth grade students in the gifted program was its irony, that is, the use of the nickname "Gifties" and the silly appearance of the boy in the Design." Id. at 918.

complaining parents that “if there was no actual threat to the safety of the students, [the school’s] behavior was impermissible and a violation of [the students’] *First Amendment* rights. *Id.* One or more students in the gifted program continued to wear the unofficial T-shirt on a daily basis several weeks after their initial discipline and continued to be punished in the same manner. The parents contended that the wearing of the T-shirt was to protest against the alleged “unreasonable rule promulgated by school administration,” as well as the punishment meted out to the students for “something as trivial as wearing a silly T-shirt. ” *Id.* at 921. The court had to determine whether the T-shirt at issue was protected under the First Amendment.

The court agreed with the Board that since the “T-shirt did not contain a statement or symbolic message, and that [students] liked the T-shirt because it was ‘silly’ and ‘ironic’ the *First Amendment* does not afford [students] protection in this case.” *Id.* at 920. The court analogized this case with *Olesen v. School District 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (finding that a male wearing an earring was in violation of the dress code and not within the scope of the First Amendment, despite his claim that it was an expression of individuality.) *Id.* at 921. The court in this case found that the T-shirt worn by the eighth-grade students was designed to express their individuality as students in the gifted program and was not protected speech under the First Amendment. *Id.* at 921.

The court decided to go one step further in its analysis to demonstrate that even if the T-shirt would fall under the First Amendment, the school would still be able to ban students from wearing it. The court cited to *Muller* in stating that a “nonpublic forum is subject to significantly greater regulation than speech in a traditional public forum.” *Id.* Therefore, as explained above, the school – generally considered a nonpublic forum – has the right to “impose reasonable restrictions on the speech of students. . .that are ‘reasonably related to legitimate pedagogical concerns.’” *Id.* Furthermore, the court pointed out that even though the students and parents feel that the school missed the “‘humor and satire’ of the shirt. . .[the students and parents] ignore[d] the plain and undisputed fact that the attempted humor of the shirt comes at the expense of physically disabled children.” *Id.* The court concluded that “[i]t is beyond question that a class T-shirt ridiculing the physically disabled is a threat to the maintenance of appropriate discipline and [a] rule that students may not wear a shirt bearing this particular design is certainly ‘reasonably related to legitimate pedagogical concerns.’” *Id.*

Political Speech

Barber v. Dearborn Public Schools, 286 F.Supp.2d 847 (E.D. Mich. 2003) involved an incident in which a student, Barber, wore a T-shirt that displayed on the front a picture of President George W. Bush with the caption “International Terrorist.” The student maintained that he wore the T-shirt in order to express his feelings about the President’s “foreign policies and the imminent war in Iraq.” *Id.* at 849. After complaints from a teacher and a student that Barber’s shirt was disrespectful, an assistant principal located Barber and told him that he needed to turn his shirt inside out or remove it. The assistant principal admitted that he felt that Barber did not *per se* violate the Student Code of Conduct; however, the nature of the T-shirt was “inappropriate because it already created a disruption or had the possibility of being disruptive

and therefore he would not be allowed to wear it at school.” *Id.* at 850. The principal supported the banning of Barber’s T-shirt based on the unique demographic make-up of Dearborn High School and her past experience at another school where disruptions occurred during “Operation Desert Storm” in 1990 and 1991.³⁴ Barber filed suit seeking a preliminary injunction,³⁵ asking the court to prevent the school from prohibiting him from wearing the T-shirt.

The court acknowledged that:

Students’ *First Amendment* rights extend beyond the classroom: “When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects. . . .”
[H]owever, that students’ *First Amendment* rights have to be balanced against “the need for affirming the comprehensive authority of the States and of school officials. . .to proscribe and control conduct in schools.”

Id. at 852, quoting *Tinker*, 393 U.S. at 512-13. In order to resolve these sometimes conflicting interests, the U.S. Supreme Court has held:

[S]chool officials may prohibit a particular expression of opinion if they can show that their “action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” . . . [H]owever, [the Court warned] that school officials’ fear of material and substantial interference must be based on something identifiable in the school setting, rather than on an unsubstantiated fear that a minority viewpoint will engender opposition[.]

Id., quoting *Tinker*, 393 U.S. at 512-13, 508-09. After a lengthy analysis as to which standard—among the trilogy of cases, *supra*—to apply in this case, the court determined that *Tinker* controlled.³⁶ Therefore, the school in order to pass constitutional muster had to meet the burden of showing that the T-shirt “caused substantial disruption of or material interference with school activities or created more than an unsubstantiated fear or apprehension of such a disruption or

³⁴Dearborn High School reflected the population of the city of Dearborn, Michigan, “which has the largest concentration of Arabs anywhere in the world outside of the Middle East. . .[with] [m]any of those students’ families immigrat[ing] to the United States from Iraq. According to [the principal], these families left Iraq because of former Iraqi President Saddam Hussein’s regime.” *Id.* at 849. In addition, because of the principal’s prior experience at a different high school during Operation Desert Storm where there were altercations between students for and against the war, she maintained that she felt Barber’s T-shirt had the potential to cause similar disruptions at Dearborn.

³⁵Pursuant 42 U.S.C. Section 1983 and 1988 and the First and Fourteenth Amendments.

³⁶The court reasoned that because the speech was “neither obscene, lewd, nor vulgar” that *Fraser* was inapplicable and since “Barber’s conduct clearly was not school-sponsored activity,” *Kuhlmeier* did not apply.

interference.” *Id.* at 856. The court determined that a complaint from one student and a teacher, along with a prior experience that occurred years ago at a different school, was insufficient evidence to show that Barber’s T-shirt created any disturbance. Furthermore, although the court acknowledged the facts regarding the demographic make-up Dearborn High School are relevant, the court ridiculed the principal for her improper assumption that “members of a particular ethnic group will have monolithic views on a subject and will be unable to control those views.” *Id.* at 857. Because school officials could not demonstrate that Barber’s wearing of the T-shirt would substantially disrupt or interfere with school activities, or that he wearing of the T-shirt would lead to a substantial disruption of the school environment or create a material interference with school activities, the court issued the injunction Barber sought. *Id.* at 860.

Guiles ex rel. Lucas v. Marineau, 349 F.Supp.2d 871 (D. Vt. 2004) also involved a student wearing a T-shirt critical of President Bush. Guiles is somewhat similar to Barber in that political speech was involved, but there are some interesting twists. The student is a middle school student. He went to a political rally where he got a T-shirt that had a likeness of the president on it. The T-shirt had quite a bit of information on it, including references to and depictions of alcohol and drugs—notably cocaine—and overall communicated “a very strong political message of disapproval (if not disdain and outright loathing) of the President’s character and policies.” 349 F.Supp.2d at 874. The student wore the T-shirt to school for two months before an administrator expressed reservations, especially regarding the drug and alcohol references. The student was eventually offered three options: (1) turn the T-shirt inside out; (2) don’t wear the T-shirt to school; or (3) cover up the drug and alcohol references. He chose the latter one, using duct tape but writing “censored” on the tape. Notwithstanding, school personnel were satisfied. The court found no fault with the school’s policy or its application, especially given the fact the student was a middle school student and that, under Fraser, the school district may censor “lewd or inappropriate speech even if the speech has political content.” *Id.* at 879. The school district did not attempt to censor the political speech as such; however, it did act pursuant to a neutral policy that prohibits dress that bears images of drugs and alcohol. *Id.* at 880. The school censored only the “manner rather than the message” of the student’s speech. *Id.* at 881. “As long as a school is not censoring political content, school officials may prohibit dress bearing images of drugs and alcohol as inappropriate for the school environment.” *Id.*

Confederate Flag

Bragg v. Swanson, 371 F.Supp.2d 814 (S.D. W. Va. 2005) began when a high school student (Bragg) wore to school a T-shirt displaying the Confederate Flag, ostensibly in observance of his southern heritage. The school has a dress code that permits clothing with slogans or advertisements so long as they do not contain obscenity, profanity, or promote illegal drugs, consumption of alcohol, or use of tobacco. In addition, students may not dress in a fashion that would disrupt the educational process or imperil the health, safety, or welfare of others. A separate enforcement procedure specifically mentions “displaying the Rebel flag” as a “symbol of racism.” Bragg, a senior, has worn clothing or accessories depicting the Confederate flag nearly every day during his high school years. There had been no reported complaints. Bragg received a one-day “noon detention” for violating the ban on the “Rebel flag.” He was ordered

not to wear to school clothing with the Confederate flag. Four months later, he was ordered to stop wearing a belt buckle with the symbol on it. Bragg sued under the First Amendment, seeking injunctive relief. The court reviewed Tinker, Fraser, and Hazelwood before settling on Tinker as dispositive. In this case, there had been no complaints and no pervasive racial disturbances at the school. There was no evidence that an across-the-board ban was necessary to maintain order and discipline at the school. The school was enjoined from preventing Bragg's wearing of the Confederate flag.

Castorina v. Madison County School Board, 246 F.3d 536 (6th Cir. 2001) involved two students who were twice suspended for wearing T-shirts displaying the Confederate flag, actions that reportedly violated the school's dress code, which bans clothing that contains any "illegal, immoral or racist implications." The students sued under the First Amendment. The federal district court granted summary judgment to the school board, but the U.S. 6th Circuit Court of Appeals reversed and remanded to the district court for trial. The students wore the T-shirts in part to "express their southern heritage." The principal ordered the students to turn the shirts inside out, but they declined. The principal eventually suspended them. When they returned from suspension, they were still wearing the T-shirts. They were suspended again. The district court found the wearing of the T-shirts did not constitute "speech" for First Amendment purposes. The 6th Circuit disagreed, noting the students were expressing a viewpoint that was easily ascertainable by an observer. It also appeared the school board's enforcement of the dress code was uneven and viewpoint specific. In addition, there was no evidence the students' actions created a likelihood of violence or other disruption within the school. Remand was necessary to ascertain necessary facts for analyzing the dispute under Tinker, Fraser, and Hazelwood.

Professional Team Allegiance

Sonkowsky v. Board of Education for Independent No. 721, 327 F.3d 675 (8th Cir. 2003) involved an elementary school student who attended a Minnesota public school. Although he attended school and lived in Minnesota, the student was a rabid fan of the Green Bay Packers of the National Football League rather than the Minnesota Vikings. Sonkowsky worked the Green Bay Packers into as many school projects as possible, often in defiance of teacher directives. In a contest sponsored by the Vikings, the student had to be instructed not to wear his Green Bay Packers' jersey. The student was excluded from some field trips, including one to the Vikings' training facilities. His disruptive conduct and disrespectful behavior raised concerns he would embarrass the school if he attended. The district court found—and the 8th Circuit affirmed—that the student's exclusion was based on his conduct and not on any constitutionally protected speech. "[The student's] preference for the Packers does not trigger heightened protection, and thus the teachers' reasonable curriculum-based decisions with regard to appearance and attendance at school-related functions will not support a [civil rights'] claim." Id. at 677. "[T]he record overwhelmingly indicates that [the student's] conduct, independent of any expressive ideas, was the focus of the school's concern." Id. at 678.

COURT JESTERS: SEVENTH-INNING KVETCH³⁷

Baseball was once “America’s Favorite Pastime.” Its history and influence extended to the American language, adding such colorful terms to everyday discourse as “balk,” “double play,” “pinch hit,” “extra innings,” “sacrifice fly,” “suicide squeeze,” “pinch hit,” “bean ball,” “brush back pitch,” “fielder’s choice,” “broken bat single,” “spit ball,” “home run,” “Texas Leaguer,” and “basket catch.” Not without surprise, such terms and terminology became the argot of the business world.³⁸

Aficionados of the game have long rhapsodized about the merits of baseball, often equating the nuances of the game to the mysteries of life. Even Supreme Court Justices are not immune to such musings (see **Quotable**, *infra*). If the highest court cannot refrain from doing so, “I think it too much to expect a mere tyro on the [federal] district bench to cleave to the issues in the face of that august example,” wrote Judge John L. Kane, Jr., in the opening inning of his decision in King v. Burris, 588 F.Supp. 1152 (D. Colo. 1984).

King involved “one of the less memorable events in the history” of baseball—a dispute between two executives of minor league teams during the 1981 winter meetings. King and Burris disagreed over league expansion and scheduling. At one point, Burris lost his temper and “hurled a barrage of verbal beanballs at King,” such as “fatso” and “liar.” Burris purportedly also said “I ought to hit you in the mouth” and “why don’t you do the game of baseball a favor and resign.” King also said Burris threatened him with a Sprite bottle, but the pleadings “are unclear as to whether Burris’ intended delivery was overhand, sidearm, or submarine style, or whether Burris was gripping the bottle properly, label side up.” 588 F.Supp. at 1154, *n.* 4. King sued Burris for defamation and negligent and intentional infliction of severe emotional distress, claiming Burris’ actions caused him to resign from his executive position and seek medical attention. Judge Kane did not see this as an ordinary claim for damages.

If I were capable of complete judicial restraint, I would begin this opinion by stating that this is an action for damages based upon allegations of intentional infliction of severe emotional distress and defamation.... But this is not just a case about damages; this case is about baseball! . . .

For almost a century, baseball has been America’s national pastime. From Babe Ruth’s “called shot” to Carlton Fisk’s twelfth inning home run to win the sixth game of the 1975 World Series, baseball has sparked the imaginations of generations of Americans. Though changes have occurred which make grown men cry, its essence remains unchanged. Baseball is uniquely unconstrained by

³⁷“Kvetch” is a Yiddish term (from German) to describe habitual complaining or whining.

³⁸Alas, baseball is no longer the national pastime. Football now reigns, and *its* terminology is increasingly in vogue, such as “quarterback,” “Monday Morning Quarterback,” “touchdown,” “sustained drive,” “Hail Mary Pass,” “Big Uglies,” “coffin corner,” “red zone,” “blitz,” “blind-sided,” “fumble,” and “red shirt.”

clocks and time-keepers. Perhaps as a result, baseball's memories are the most vivid, and many of our fondest recollections are of afternoons and evenings at the ballpark.

Id. at 1153-54.³⁹ King, unfortunately, is about to strike out in Judge Kane's court on his claims of emotional distress. Burris never made any physical contact with King. In addition, "I find that Burris' behavior, however unsavory even in sporting circles, was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 1157, quoting *Restatement (Second) of Torts*, § 46 comment d (1965).

King fared a little better—but not much—on his defamation claim. "Burris' comments, while hardly reminiscent of Cyrano de Bergerac's nose speech among baseball's contributions to the ancient art of insult, do state a cause of action for defamation."⁴⁰ However, King failed to satisfy a procedural requirement for initiating such a defamation action against Burris. Judge Kane dismissed King's defamation charge "without prejudice," which the court—for the benefit of the parties—defined as "a technical legal term which means about the same as Yogi Berra meant when he said, 'The game's not over until it's over.'" *Id.* at 1158, *n.* 11.

The judge did wax philosophic, observing that this little squabble between two baseball executives would not harm the game.

Baseball mirrors our foibles and fallibilities. The game has survived the Black Sox scandal of 1919, striking umpires, striking players, drug and alcohol problems, and even perhaps George Steinbrenner.

Id. at 1154. Will it survive? Or will it be blind-sided in the red zone by blitzing Big Uglies while trying a Hail Mary pass?

³⁹ Judge Kane's decision is meticulously footnoted, with a number of colorful and off-color quotes from some of the famous and infamous denizens of the diamond. A favorite: "Despite the changes and complaints [to the game, such as the designated hitter and artificial turf], visitors to modern ballparks witness a sport that has maintained its noble fascination since the nineteenth century. Bill Veeck, baseball's notorious promoter, said that 'Baseball is almost the only orderly thing in an unordered world. If you get three strikes, even the best lawyer in the world can't get you off.'" 588 F.Supp. at 1153, *n.* 2.

⁴⁰The court includes several examples of "baseball insults," including quotes from George Bernard Shaw ("There is no reason why the field should not try to put the batsman off his stroke at the critical moment by neatly timed disparagements of his wife's fidelity and his mother's respectability."); Graig Nettles ("The more we lose, the more Steinbrenner will fly in. And the more he flies, the better chance there will be a plane crash." 1977); Charlie Finley ("I have often called Bowie Kuhn a village idiot. I apologize to all the village idiots of America. He is the nation's idiot." 1981); and Marty Springstead, an umpire, on Baltimore Oriole manager Earl Weaver ("The best way to test a Timex would be to strap it to Weaver's tongue."). 588 F.Supp. at 1157, *n.* 9.

QUOTABLE . . .

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. The early game led ultimately to the development of professional baseball and its tightly organized structure.... The ensuing colorful days are well known.... One recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat"⁴¹; the ring of "Tinker to Evers to Chance"⁴²; and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending on the point of view, the "great American tragedy."

U.S. Supreme Court Justice Harry A. Blackmun, in Flood v. Kuhn, 407 U.S. 258, 260-64, 92 S. Ct. 2099 (1972), an anti-trust action against professional baseball that failed. Quoted by federal district court Judge John L. Kane, Jr., in King v. Burris, 588 F.Supp. 1152, 1153, *n* 1 (D. Colo. 1984).

UPDATES

THE PLEDGE OF ALLEGIANCE

The U.S. Supreme Court's decision in Elk Grove Unified School District, et al. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004) avoided the question whether Congress's 1954 insertion of "under God" into the Pledge of Allegiance violated the First Amendment's Establishment Clause.⁴³ Rather, the court found that Newdow did not have standing to prosecute his Establishment Clause claim on behalf of his minor daughter.⁴⁴

The non-decision predictably invigorated state legislatures to enact laws mandating recitation of the Pledge. However, it also invigorated efforts by others to challenge the inclusion of "under God," but not all for the same reasons as Newdow, an atheist. In Myers v. Loudoun County Public Schools, Commonwealth of Virginia, 418 F.3d 395 (4th Cir. 2005), a parent challenged legislation mandating the daily, voluntary recitation of the Pledge of Allegiance. However, he

⁴¹"Casey at the Bat" first appeared in the *San Francisco Examiner* on June 3, 1888.

⁴²Franklin Pierce Adams, Chicago-born American journalist and humorist, coined this phrase to describe the lethal double-play combination of the Chicago Cubs' Joe Tinker (shortstop), Johnny Evers (second base), and Frank Chance (first base). "Baseball's Sad Lexicon," *New York Mail* (July 1910).

⁴³"Congress shall make no law respecting an establishment of religion."

⁴⁴See "The Pledge of Allegiance: 'One Nation, Under Advisement,'" **Quarterly Report** April-June: 2004. Also consult the Cumulative Index for other articles on the Pledge of Allegiance.

was motivated by his own faith tradition that required his allegiance only to “Christ’s kingdom, [and] not the state or society.” His efforts fell short. This was a high-profile case (thirty states supported Virginia’s position as *amici curiae*).⁴⁵

Meanwhile, Newdow has mounted a new challenge, one designed to overcome the standing issue that undermined his last effort. In Newdow, et al. v. The Congress of the United States of America, 383 F.Supp.2d 1229 (E.D. Cal. 2005), the federal district court—obliged to follow precedence by the U.S. 9th Circuit Court of Appeals in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003)—found substantially in Newdow’s favor, setting the stage for a renewed battle before the 9th Circuit.

In Newdow’s latest challenge to the constitutionality of the wording of the Pledge of Allegiance, as codified at 4 U.S.C. § 4, he and others sued four California public school districts that require their students to recite the Pledge. Plaintiffs assert this violates the First Amendment’s Establishment and Free Exercise Clauses as well as the Fourteenth Amendment’s Equal Protection and Due Process Clauses. California law requires each public elementary school in the state to “conduct...appropriate patriotic exercises” at the beginning of the school day, with the recitation of the Pledge being one means of satisfying this requirement. 383 F.Supp.2d at 1231, 1233.

Elk Grove Unified School District, where Newdow’s daughter attends school, has implemented a policy that reflects the statutory requirement. Elk Grove does permit students who object on religious grounds to abstain from recitation of the Pledge. *Id.* at 1233. Newdow also objects to the recitation of the Pledge at school board meetings. *Id.* at 1235. All adult plaintiffs claim that they are made to feel like a “political outsider” due to the “government’s embrace of [Christian] monotheism in the Pledge of Allegiance.” *Id.* at 1236. Defendants moved for dismissal.

The dispositive issue in Newdow’s last venture before the Supreme Court was his standing to prosecute such an action on behalf of his daughter. Elk Grove Unified School District, et al. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004).⁴⁶ The Supreme Court found he lacked prudential standing to bring suit in federal court, either as the custodial parent or as a taxpayer. 383 F.Supp.2d at 1234.

The federal district court found that Newdow continues to lack prudential standing as a parent to bring these claims on behalf of his daughter. The custody arrangement has not changed since the Supreme Court rendered its decision. His standing as a taxpayer also again failed. *Id.* at 1237-38. As a consequence, Newdow’s claims were dismissed. *Id.* at 1239. Notwithstanding the disposition of Newdow’s claims, other plaintiffs did satisfy the prudential standing requirements to prosecute these claims. *Id.* at 1240.

⁴⁵See “Pledge of Allegiance” (Update) **Quarterly Report** April-June: 2005.

⁴⁶Ironically, the Supreme Court issued its decision on June 14, 2004, which is also “Flag Day.”

The federal district court recognized that the Supreme Court had reversed the ultimate decision of the 9th Circuit in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), but this reversal was based on Newdow's standing. "It is established that there is a distinction between a case being reversed on other grounds and a case being vacated. A decision that is reversed on other grounds may still have precedential value, whereas a vacated decision has no precedential value." 383 F.Supp.2d at 1240 (citation omitted). The Supreme Court found that Newdow lacked "prudential standing" (judicially imposed limitations on the exercise of jurisdiction) but did not find he lacked "Article III" standing (the right to bring a case or controversy under the U.S. Constitution). "When a court lacks Article III standing, there is no jurisdiction because there is no case or controversy within the meaning of the Constitution. A federal court, however, may reach the merits when only prudential standing is in dispute." Where a court reaches the merits of a dispute despite a lack of "prudential standing," "it follows that where an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court's decision binds the [federal] district courts below." As a consequence, the federal district court stated it was bound by the 9th Circuit's decision in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), which found that the inclusion of "under God" in the Pledge did violate the Establishment Clause of the First Amendment by coercing a religious act. Id. at 1241-42.

The plaintiffs' challenge to the recitation of the Pledge at school board meetings failed, however. The federal district court found there was no compulsory recitation involved. "It cannot be gainsaid that the practice of reciting the Pledge in the context of adults attending a school board meeting tenders a different question than the recitation of the Pledge in a classroom." Id. at 1242-43.

The court denied the defendants' motion to dismiss the challenges with respect to classroom recitation of the Pledge, but granted the defendants' motion as to all other claims, including Newdow's claims.

THEORY OF EVOLUTION

Disputes over the teaching of the Theory of Evolution in public high school science classes continue to arise at both the local level and in the courts.⁴⁷ The federal district court in Pennsylvania recently decided Kitzmiller v. Dover School Board, which will be discussed in the next **Quarterly Report**. The Kitzmiller dispute centers on the teaching of "Intelligent Design" (ID) in science classes in the school district, purportedly to improve science education and encourage critical thinking by providing a balance to the Darwinian Theory. ID proponents represent that the complexity and order of life could not have occurred through a random process

⁴⁷See "Theory of Evolution" (Update) in **Quarterly Report** January-March: 2005, discussing Selman v. Cobb Co. Board of Education, 390 F.Supp.2d 1286 (N.D. Ga. 2005), where the federal district court found the school board's attempt to place stickers in science textbooks critical of the theory of evolution contravened the First Amendment. The school board has appealed to the U.S. 11th Circuit Court of Appeals.

of natural selection but would require the guidance of a supernatural power. Plaintiffs assert ID is a faith-based belief and inappropriate for science classes.

Some Indiana legislators are considering legislation during the 2006 session of the General Assembly that would require the teaching of ID along with the Theory of Evolution.⁴⁸

Although “Creationism”⁴⁹ and ID have been prominent in these continuing disputes, there are other alternatives being promoted by critics of the Theory of Evolution. One such alternative is known as “Quality Science Education Policy” (QSEP).

Caldwell v. Roseville Joint Union High School District, et al., 2005 U.S. Dist. LEXIS 24923 (E.D. Cal. 2005) involved a proponent of QSEP (Caldwell) who wanted to have this introduced into the school district’s biology classes in part to expose the “scientific weaknesses of evolution.” In order to achieve this end, Caldwell sought to place QSEP on the school board’s agenda, participate on the curriculum instruction team, and initiate the “instructional materials challenge” procedure created by the school district.

Caldwell attempted to place QSEP on the school board’s agenda on twelve (12) occasions. His intention was to create debate on the concept and, eventually, have the school board adopt QSEP. The school board, however, would not place it on the agenda until Caldwell obtained approval from each high school curriculum council. Notwithstanding, Caldwell continued to attempt to bring up QSEP at school board meetings. He eventually sued the school board, asserting the school board’s refusal to place QSEP on its agenda discriminated against him on the basis of his viewpoint or religious beliefs and affiliations.

He also attempted to present his ideas to the Curriculum Instruction Team (CIT) at his daughter’s high school. The CIT is a parent advisory group. The CIT scheduled a meeting for parent input on the updating of the science curriculum. Caldwell and several others who support QSEP showed up at the meeting, but the high school principal would not permit a discussion on this topic. Caldwell also sued the principal, alleging the principal’s actions were motivated by hostility toward his actual and perceived religious beliefs.

Caldwell also initiated an “instructional materials challenge” against the school district’s use of the Holt Biology Textbook. He claimed the textbook’s coverage of evolution was not “accurate, objective, and current,” as required by California law. Caldwell represented this defect could be cured by supplementing the current text with the QSEP materials. Nineteen (19) science teachers reviewed his challenge; each rejected his proposal. Caldwell stated these actions constituted “religious animus” and viewpoint discrimination. He also asserted taxpayer claims against the school defendants, alleging their practices constitute waste or illegal expenditure of

⁴⁸“GOP Lawmakers Want Schools To Teach ‘Intelligent Design,’” *The Indianapolis Star* (November 3, 2005).

⁴⁹Please consult the Cumulative Index for previous articles on “Creationism,” “Creation Science,” and Evolution.

public funds. Caldwell's constitutional claims were brought principally under the First Amendment's Free Speech and Establishment clauses and the Fourteenth Amendment's Procedural Due Process and Equal Protection clauses.

All the defendants moved to dismiss the lawsuit. The court granted the motion in part but denied it in part. The court noted that Caldwell's claims with respect to the school board refusing to place QSEP on its agenda involves an analysis of the government's ability to limit private expression in a public context. California law designates school board meetings to be a "limited public forum," opened to the public in general but limited to comments related to the school board's subject matter. The school board may impose "content neutral regulations on speech in limited public fora if they are reasonable time, place, or manner restrictions." Such content-neutral regulations must be narrowly drawn to achieve a compelling governmental interest. At this stage of the proceedings, Caldwell has sufficiently pled a claim for violation of his First Amendment "free speech" rights.

The court wasn't as receptive to Caldwell's claim that the defendants deprived him of his First Amendment right to petition the government for redress of his grievances. This right does not include an absolute right to speak in person to officials. His claim centers on the school board's refusal to place his item on the school board agenda for discussion. "The right to petition does not require that plaintiff be given an opportunity to speak publicly about his petition nor that the government act upon his petition." Caldwell sent numerous letters to school board members; the school board members responded to his letters. The fact the school board was disinclined to act upon his QSEP proposal does not violate the First Amendment. The First Amendment does not impose any affirmative obligation on the school board to listen or to respond. In addition, even though he was not permitted to raise QSEP with the CIT, the principal did provide him an opportunity to discuss it with him personally. Caldwell was given an opportunity to petition the government. No constitutional right was violated. The defendants' Motion to Dismiss on this allegation was granted.

Caldwell also claimed the defendants exhibited hostility toward him and his Christian religious beliefs. The court found he had sufficiently pleaded "religious animus" through the defendants' actions of disapproval of his actual or perceived religious beliefs. The defendants' Motion to Dismiss the Establishment Clause allegation was denied.

The court also found that Caldwell has sufficiently pled a claim under the Fourteenth Amendment's Equal Protection Clause. He claimed defendants referred to him pejoratively as a "right-wing evangelical Christian fundamentalist" and restricted him and others similarly inclined from exercising their constitutional rights based on their viewpoint or religious beliefs and affiliations.⁵⁰ The court also found Caldwell sufficiently pled that defendants deprived him

⁵⁰The court is not determining that Caldwell's claims have merit. Where a Motion to Dismiss has been asserted, the court must accept as true the factual allegations in the plaintiff's complaint. The court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. The defendants will likely later move for summary judgment, which is based on different standards.

of his procedural due process rights by engaging in a “pattern and practice of preventing [him] from exercising his constitutional rights” through unwritten policies and practices that are unconstitutionally vague.

Caldwell was permitted to amend his complaint, the fourth time he has been permitted to do so. The court’s decision was rendered on October 25, 2005. Further action is likely.

Date: 1/27/06

/s/ Kevin D. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education

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